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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954

No. 195

EUGENE H. CONSER,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND APPENDIX

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To The Honorable The Supreme Court of The United States of America:

Eugene H. Conser, by Francis H. Monek and Claude W. McElwee, his attorneys in this behalf, respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Supreme Court of the State of Missouri in the above cause.

In this behalf, Petitioner shows unto the Court:

I.

Opinion of the Court Below

Conser v. *Atchison, T. and S. F. Ry. Co.*, ... Mo. ..., 266 SW (2nd) 587 (R. 444 and see Appendix to this Petition).

II.

Statement of Grounds on Which the Jurisdiction of This Court Is Invoked

Date of judgment to be reviewed, March 8, 1954 (R. 442, 443).

Rehearing denied, April 12, 1954 (R. 465).

Stay of Mandate, May 5, 1954 (R. 467).

Statutory provision believed to confer on this court jurisdiction to review the judgment in question. 28 U. S. C., Sec. 1257(3).

The rights, privileges and immunities here claimed arise under The Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. A., Sections 51-60.

III.

The Question Presented for Review

The sole question presented here for review in this case is:

Whether Petitioner's federal right, under the Federal Employers' Liability Act, to the fair, impartial and unprejudiced consideration of the jury in its deliberations and return of its verdict was or could have been prejudiced by the erroneous admission in evidence at the trial of Defendant's Exhibits 7 and 8, consisting of (Ex. 8) Application by Petitioner, five years prior to the accident

here involved, for domiciliary care at a Veterans Hospital at Wichita, Kansas for a condition shown by competent testimony at the trial to have been due to overwork as an employee on Respondents' freight trains, under World War II conditions, and (Ex. 7) a clinical record of diagnoses, treatments and complaints by petitioner over a period of thirty days in June and July 1945, containing conclusions that Petitioner at that time was suffering from a condition described as "psychoneurosis, anxiety type mild," together with the use made of these documents at the trial.

IV.

Statutes Involved

(1) 28 U. S. C. 1257(3).

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

(2) 45 U. S. C. A., Section 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between

the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

V.

Statement of the Case

(a).

This action was brought in the Circuit Court of the City of St. Louis, Missouri, by Petitioner, an employee of Respondent, under The Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-60, to recover damages for in-

juries suffered by him in an accident, April 28, 1950, as a result of the alleged negligence of Respondent (R. 1-4).

Trial was had before the court and a jury. The jury returned a verdict for Respondent. The trial court, after overruling Petitioner's Motion for a New Trial, entered judgment on the verdict (R. 7, 434, 438).

Petitioner appealed to the Supreme Court of Missouri. That Court affirmed the judgment (R. 442-443).

The case, as made by the pleadings (R. 1-6), is based upon the principle of Res Ipsa Loquitur.

(b).

The Stage in the Proceedings at Which the Question Was Raised

Defendant's Exhibits 7 and 8 as described in the question presented were admitted in evidence over objections made at the trial by Petitioner's Counsel (R. 248-267). The grounds of objection were, in the main, that the proper foundation for the admission of the documents in evidence had not been laid, that they were in violation of the hearsay rule and that the truth of their contents could not be tested by cross-examination (R. 255, 256).

The question was raised in Petitioner's brief in the Supreme Court by assignment of error on the grounds that it constituted a false issue that introduced into the case the question of Petitioner's general sanity as opposed to the condition resulting from his injuries which was the subject of inquiry at the trial. The assigned error was passed upon by that Court in its opinion, where the court states (266 SW (2nd), 591), (R. 450):

> "Plaintiff alleges error in admission of a United States Veterans Administration Hospital Record concerning plaintiff's stay at its Wichita Hospital in

June and July, 1945, for 30 days. Plaintiff's counsel had said in his opening statement that plaintiff went to the Veterans Hospital at this time because he was tired out from overwork during the war years. Plaintiff testified that he did go because he was 'just wore out' but denied having a nervous condition. The clinical record admitted showed that plaintiff complained of being 'a little nervous and tired out and run down' and had a sensation 'like some little bugs or something crawling on the skin at times' and contained the diagnosis, 'Psychoneurosis anxiety type mild.' "

The Court held it was error to admit the document, but that it was not prejudicial and reversible error for the reason that it "related only to the extent of plaintiff's injuries and the amount of damages" and the jury had found for the defendant on the issue of liability (*Conser* v. *A. T. & S. F. R. Co.*, 266 SW (2nd) 592, R. 452).

The question was again raised in the Petition for Rehearing which was denied (R. 456-464). It was there brought to the Court's attention that these documents were offered and received in evidence without any indication from counsel or from the Court that their effect was to be limited to any particular issue in the case and was therefore before the jury for all purposes and for whatever use the jury might have made of the contents (R. 548).

(c).

The Facts Material to the Consideration of the Question Presented

The accident in which Petitioner was injured occurred April 28, 1950. He was then about 52 years old. He had been employed by Respondent since 1920 and had had, at the time of the accident, 32 years' experience in meeting the shocks and jerks and other violent hazards of railroading. The train on which he was injured was com-

posed of 59 cars, including the caboose in which he was riding (R. 86).

Petitioner was the conductor on a freight train that left Arkansas City, Kansas at 1:00 P. M., April 27, 1950 and reached South Shawnee, Oklahoma, at 12:05 A. M., April 28th where the accident happened (R. 83, 85, 86).

He was sitting at his desk in the caboose making out his reports for the trip when the train stopped near the entrance to the South Shawnee switch yards to permit the acting head brakeman to get off, go forward and throw a switch, so as to allow the train to proceed into the yards (R. 102, 103, 363, 364). It usually took about 4 or 5 minutes for this operation. Conser, as he sat at his desk, noted that some 10 minutes had elapsed since the train came to a stop (R. 86, 87). As conductor, it was his duty to investigate the delay. He put down his pencil, put his hands on his desk and started to arise from his chair. As he did so there was a sudden violent jerk of the caboose that threw him out of his chair and against an iron stanchion that stood about 20 inches to his right (R. 86, 90, 174). His head struck the stanchion, lacerating his right ear and fracturing his skull just above and in front of his ear in what is described as the right temporal region. He was rendered unconscious by the blow and fell to the floor of the caboose and his chair and a coal bucket, the only two items of the contents of the caboose not securely fastened to the floor or walls of the caboose, were thrown from their places and about the caboose (R. 86, 90, 91, 92, 174). It was the most violent jerk he had ever experienced in all of his thirty-two years of railroading (R. 90-93).

When he came to, Meek, the sick head brakeman who for a portion of the journey had been lying on one of the bunks in the caboose, was standing over him as he lay on

the floor. He asked Meek what had happened. When he got up he asked Meek to call the yard office and have them come with an engine and get the caboose, as he could not walk. The engine came and took the caboose to the yard office. When it reached there Conser opened the door to step out, but fell unconscious again. When he came to again he was in the Shawnee City Hospital (R. 91, 95, 96, 176).

He was examined there by Dr. C. G. Young, one of Respondent's physicians. It was found that there was a laceration of his right ear and a linear fracture of the skull in the right temporal region (R. 118, 119). The medical men differed as to the type of fracture. Dr. Morgan, one of Petitioner's medical witnesses, testified (R. 45):

> "Physical examination on him reveals a gross defect in his skull that you can feel by running your hands over him; it felt as if there was a great big bony overgrowth there apparently where this blow was received."

Dr. Morgan, who treated Petitioner during a period from shortly after the accident up to the time of the trial, May 21, 1952, further testified that Petitioner was suffering from "traumatic encephatolomy." In describing the meaning of this, the doctor said (R. 54):

> "By that I mean that the brain has been traumatized, has been injured, has been damaged; and it has caused a disturbance of the function of the brain and the personality and the mind."

Dr. F. M. Barnes, also for Petitioner, agreed with Dr. Morgan (R. 217).

Dr. E. H. Parsons, Respondent's chief medical witness, agreed with other doctors in that there was a depression at the point of fracture (R. 306), but as to whether Petitioner's condition was due to the trauma described by Dr.

Morgan and Dr. Barnes, he disagreed and clung to the theory that Conser's condition had no relation to the injury. When asked on cross-examination whether an injury bringing about a skull fracture could be a precipitating factor in Conser's condition, the answer was (R. 323):

> "Well, no, sir, because he had the condition beginning in either 1944 or 1945."

That was Respondent's theory throughout the trial and defense counsel so argued to the jury (R. 419-420).

The evidence as to Mr. Conser's health is consistent with his work record over a period of thirty-two years. He was always in perfect health, mentally and physically (R. 183). His own version of his experience at Veterans' Hospital in 1945, given on cross-examination at the trial, in that connection, in which he contradicts all of the implications of Defendant's Exhibits 7 and 8, as read into the record, is included in the Appendix to this Petition.

No evidence was offered by Respondent in contradiction of Petitioner's testimony as to what happened in the caboose. The three members of the crew at the head end of the train did not know what happened there (R. 371).

According to the crew members at the head end of the train, the slack of the train was taut or stretched so that the engine would have to pull the whole weight of the train in starting to move (R. 386). It was testified that because of the stretched slack, the engine was not able to move the train forward (R. 378); that thereupon the engineer backed the engine about three feet thereby bunching the slack of 3 or 4 cars (Tr. 378, 386); and then reversed the engine to forward motion so that it gained some momentum before the bunched 3 or 4 cars were stretched and the engine was pulling the full weight of the train (R. 33, 386).

The brakeman who lined the switch climbed on the engine cab as the train moved forward "a couple of miles per hour" past the switch and into the yard (R. 386, 387).

These defense witnesses testified to the "gentle" character of this entire operation. Thus the engineer asserted that he took up the slack "gradually and carefully" and did not move the train rapidly after the slack was taken up (R. 387). The fireman testified that the engine moved forward "slowly" and that he did not notice "any kind of a jerk or jolt of an unusual character in the cab of the engine at that time" (R. 379). This constituted Respondent's only explanation of the cause of the accident.

The Supreme Court of Missouri in its opinion, found (266 S.W.(2nd) at 590, R. 448):

> "Certainly plaintiff's evidence was sufficient to make a jury case, under res ipsa, as substantial circumstantial evidence of negligence. Nevertheless, although the jury would have been warranted in inferring negligence from it, such an inference was not compelled and they could also infer from all of the evidence that defendant was not negligent. Citing *Sweeny* v. *Erving,* 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815."

The court also found that Respondent failed to make the showing required for admission of the hospital record but said (R. 452, 266 S.W.(2nd) at 592):

> "However, we cannot hold there was prejudicial error requiring a reversal because the jury found for defendant on the issue of liability and this evidence related only to the extent of plaintiff's injuries and amount of damages."

These two findings by the court raise the question presented to this court as stated above.

VI

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

The question here arises on evidence which according to the decision of the Missouri Court, was erroneously admitted at the trial. Such questions, under The Federal Employers' Liability Act, are federal questions. The right of the Petitioner to a fair, impartial and unprejudiced hearing under the Act is a federal right. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, 1064. To deprive a railroad worker of such a hearing before a jury is no different than to take the case from the jury by a directed verdict and equally raises a question of substance that calls for the exercise of this court's jurisdiction.

The Missouri Supreme Court has, in the circumstances of this case, decided this question in a way not in accord with applicable decisions of this court.

The Missouri Court after finding that the Veteran's Hospital Record was erroneously admitted in evidence, proceeded to find that the error was not prejudicial for the reason that it was related to the extent of Petitioner's injuries and to the amount of his damages and not to liability. The jury, however, was not cautioned or in any way informed that the documents were to be considered only on the issue of the extent of Petitioner's injuries and the amount of damages and that it could not make use of it in passing upon other issues in the case. There is, therefore, no way of telling what use was made of the contents of the documents that were read into the record in the presence of the jury (R. 258-264 and see Appendix).

Moreover, at the trial, the jury heard the following questions and answers:

From Dr. Young (R. 131):

"Mr. Abernathy (for defendant):

"Q. Assuming, Doctor, that this patient or plaintiff, on April 28, 1950, did fall and strike his head against a stanchion, and assuming that, in so doing, he either sustained a linear fracture of the skull without depression or that the x-ray discloses an enlarged blood vessel, and that in any event he complained of these headaches and that he had this lacerated ear that you found; and assuming the further fact that sometime between or during the year 1943, or between 1943 and 1945 or some subsequent year about that date, that this plaintiff was a patient in the Veterans Hospital at Wichita, Kansas, and was treated there for psychoneurosis: could you under those circumstances place a complete credence upon his statement of his subjective symptoms, such as a headache?

* * *

"A. If this or any other patient was definitely a psychotic individual, certainly I wouldn't place full confidence in their statements."

From Dr. Parsons (R. 322):

"Mr. Coburn:

"Q. Doctor, may I just ask you this: does a psychoneurotic person usually have an accurate understanding of his condition?

"A. You mean by impaired judgment, sir?

"Q. Well, I mean of his own condition, of what's wrong with him. Does a psychoneurotic usually have a very accurate understanding of his own condition?

"A. Well, no. He would be fairly honest, but would see, let's say his own condition as through his eyes.

"Q. Yes, of course. I am talking about an accurate understanding.

"A. Well, not an objective understanding and not one that we would agree was correct, let's say medically.

"Q. Or that you could rely on. Is that right?

"A. Well, I wouldn't be willing to rely on it until I knew all I could about a person."

The effect of this emphasis upon this experience of Mr. Conser in 1945 could well have led the jury to believe that his entire story of what happened in the caboose was unreliable. It could have furnished the reason why the jury on the evidence, as the Missouri Court says in its Opinion (R. 444) could have decided either for the plaintiff or for the defendant, brought in the verdict for defendant.

However, the Missouri Court says: (R. 452):

> "As to the second, the medical evidence offered by plaintiff showed far worse mental condition than indicated by the hospital record, including delusions and false beliefs; and plaintiff's counsel stated to the jury that plaintiff had symptoms of insanity and that his mind was 'irretrievably gone.' If his credibility was affected by evidence of an abnormal mental condition, this was done as a part of plaintiff's case."

The medical testimony offered by Petitioner at the trial to establish the Condition of Petitioner resulting from the accident, came from qualified experts who were cross-examined under oath. The remarks of Petitioner's Counsel were based on that testimony. If a jury could be so affected by evidence of the consequences of an injury, such as that received by Petitioner, then it would become next to impossible, in any such case, for one so injured, to recover in a suit under the Federal Act.

This Court long ago announced the applicable rule in these circumstances. In *Deery* v. *Cray*, 5 Wall 795, 72 U. S. 795, (1866) at Page 807 the principle which we believe controls this case was stated as follows:

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the parties rights."

This principle was again affirmed by the Court in *Mexia* v. *Oliver,* 148 U. S. 664 (1893) and it is, today, established law in both State and Federal Courts. See 5 C.J.S. Sections 1724-1725.

The doubt here cannot be resolved against prejudice on the mere ground that the documents of which Petitioner complains relate, only, to the issues of extent of injuries and damages. The average jury is not prepared, without some warning from counsel that offers the evidence or from the court in submitting the case to the jury, limiting the effect to the appropriate issues. Even then there could remain grave doubt whether or not improper use has been made of such evidence by the jury.

Moreover, the fact that these documents were erroneously admitted is not the whole question. These documents of 1945 vintage do no more, in any event, than to suggest only an inference that Petitioner, after the accident of April 28, 1950, might merely have been suffering from a continuation of the condition dubiously described in the hospital report. Such an inference cannot bridge such a five-year gap and do duty for probative facts that could have been gathered by Respondent from men who worked with Mr. Conser and under his supervision as a foreman, and who would have been first to note any act or conduct or any other evidence that petitioner was afflicted with "Psychoneurosis, anxiety type, mild" during that five-year period. Instead of offering direct proof of a continuation of the condition described in the Hospital

Record, if it did continue, it was sought to bridge the five-year gap by pure inference drawn from that Record. In a case similar, in many respects, to the one at bar, this Court said, *Galloway* v. *United States,* 319 U. S. 372, 63 S. Ct. 1077, at 1085 (1943):

> "Inference is capable of bridging many gaps. But not, in these circumstances, one so wide and deep as this. Knowledge of petitioner's activities and behavior from 1922 or 1925 to 1930 was peculiarly within his ken and that of his wife, who has litigated this cause in his and presumably though indirectly, in her own behalf. His was the burden to show continuous disability. What he did in this time, or did not do, was vital to his case. Apart from the mere fact of his marriage, the record is blank for five years and almost blank for eight. For all that appears, he may have worked full time and continuously for five and perhaps for eight, with only a possible single interruption."

This point was called to the attention of the Supreme Court of Missouri in the Petition for Rehearing (R. 463).

Thus, whatever inferences the jury drew from these documents, if any, were drawn from documents not only erroneously admitted in evidence, but from documents having no probative value whatever.

It is upon this theory and the above language of this Court that Petitioner asks this Court to review the decision of the Missouri Court.

It is upon the foregoing contentions and principles announced by this Court that Petitioner asks for a review of the decision of the Missouri Court.

PRAYER

For the reasons above given, Petitioner prays for a writ of Certiorari directed to the Supreme Court of the State of Missouri to the end that the judgment of that Court affirming the judgment of the trial court may be reviewed by this Court and reversed with directions, ordering a new trial in this cause.

Respectfully Submitted,

FRANCIS H. MONEK,
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Of Counsel.

APPENDIX

APPENDIX

IN THE

Supreme Court of Missouri

DIVISION NUMBER ONE

JANUARY 1954 SESSION

EUGENE H. CONSER,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
a Corporation,

Respondent.

No. 43,454

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Honorable Eugene J. Sartorius, Judge

Action under the Federal Employers' Liability Act (USCA 51-60) for $100,000.00 damages for personal injuries. The verdict and judgment were for defendant and plaintiff has appealed. Plaintiff claims error in denying his motion for new trial, in rulings on evidence and in giving certain instructions.

Plaintiff's brief does not comply with Rule 1.08(a)(3) but we will rule this case on the merits since we are able to determine from the whole brief the allegations of error and the points made under them, which present important questions, and because we have decided other recent cases

on the merits where the situation was similar. (See *Ezell* v. *Kansas City,* Mo. Sup., 260 S W. (2d) 248; *Fosmire* v. *Kansas City,* 260 S. W. (2d) 252.) To properly comply with Rule 1.08(a)(3) the allegations of error and the points relied on should constitute a short concise outline of the part of the brief called "an argument" in 1.08(a)(4). The purpose of this is to give the appellate court a short concise summary of what appellant claims the trial court did wrong and why he claims it was wrong.

Plaintiff alleged general negligence relying on the res ipsa loquitur doctrine. Plaintiff was the conductor of a 59 car freight train from Arkansas City, Kansas, to its destination in the South Shawnee yards in Oklahoma; and was riding in the caboose when injured, by having his head strike an iron post or stanchion at the side of the desk where he had been working. The pleading and submission of negligence was that defendant so carelessly and negligently operated the train that the caboose "was caused to be suddenly, unexpectedly and violently jerked with such force and violence that the plaintiff was thereby directly caused to be thrown against an iron post" and that the jerk was "unusual and extraordinary." According to plaintiff's own testimony, when the train stopped at the entrance of the South Shawnee yards, he was working on his reports at his desk, which was against the right side (engineer's side) of the car. Forward from the desk on the same side of the car was a bunk upon which a brakeman, W. P. Meek, was lying with head toward the desk. Meek had become sick during the trip and had to lie down in the caboose. It was necessary for the train to stop so that a brakeman could throw a switch to let the train enter the yard and the brakeman also had to phone the yard office to find out which track the train was to use. Plaintiff, thinking the train had been stopped too long, "started to rise, to go out and see what was the matter." Plaintiff

said: "I laid my pencil down on the desk, put my hands on the desk and just started to raise when it was jerked out from under me, chair and all, throwing me against this iron post." This post was about 20 inches from his head as he stood at the desk. As to the violence of the jerk, plaintiff said: "Well, I never got one like it before. * * * It was the worst one I ever got." He said it overturned his desk chair and also a coal bucket near the caboose stove. He said he was knocked unconscious and the medical testimony showed he had a lacerated right ear and a linear fracture of the skull about three inches long.

Defendant's evidence, by the engineer, fireman and brakeman, was that in approaching the yard it was downgrade for about a mile and a half through the City of Shawnee; that the train brakes were applied so the train went through the city at less than 15 miles per hour; and that this application of the train brakes kept the slack stretched between the cars, so that the train stopped at the yard entrance with the slack stretched. Their testimony was that because of this condition it was necessary to back the engine about three feet to take up the slack in the first 3 or 4 cars before the train could be started, after the switch was thrown. The engineer said that he moved forward gradually and carefully, and attained a speed of about two miles per hour going into the yard, the brakeman getting on the engine as they passed the switch. The fireman said that the engine started forward slowly and that he did not notice any jerk or jolt of an unusual character in the engine cab. The fireman also estimated the speed at two miles per hour when the brakeman got on at the switch. The brakeman estimated it at only a mile or a mile and a half per hour when he got on. He also said the engine started slowly and that he heard no noise in starting beyond the first three or four cars. All of defendant's witnesses said that in a movement of this kind the heaviest

jolt would be at the fourth or fifth car, that is the next car back of where the slack was taken up. It was further shown that the trainmen found nothing wrong with the caboose when they looked at it after plaintiff was injured.

Defendant also had testimony by its Road Foreman of Engines that there is about one inch of free slack between all couplings, and that it is necessary to have this much play so that the couplers will operate in coupling and on curves. There is also about 2½ inches of what is called "controlled slack" in each coupler, which is due to having springs in the couplers for the purpose of absorbing or cushioning the shock of moving or coupling cars. Thus there is a total of about six inches slack between cars. Slack is helpful in starting a train because many times it would be impossible to start a train if it were so rigid that the whole train would have to be started as a unit. The best practice is to stop a train with the slack stretched out, and this is done by use of the train brakes operating on the entire train. If stopped by the independent engine brakes alone, the slack would run in and be bunched, especially on a down grade, so that in starting the train it would be necessary to pull the slack out on each car. This would make the start rougher than it would on a stretched train. Therefore, it is more conducive to good train handling, and easier to control the slack, to keep it stretched; and the only way to do this is by use of the train brakes. There is necessarily more jolting in starting a freight train than a passenger train because there are more cars and a different type of coupler springs. There is usually some slack action in the caboose; trainmen expect it and learn how to brace themselves against it at all times.

Plaintiff's contention, "that there is not a reasonable basis in the evidence for the verdict and the Court erred in denying plaintiff's motion for a new trial", really amounts to a claim that the verdict is against the weight

of the evidence. Since the plaintiff has the burden of proof, it is not necessary to have substantial affirmative evidence, or any evidence at all, to support a defendant's verdict. (*Steckdaub* v. *Sparks,* Mo. Supp., 231 S. W. (2d) 160; *Woehler* v. *City of St. Louis,* 342 Mo. 237, 114 S. W. (2d) 985; *Bloch* v. *Kinder,* 338 Mo. 1099, 93 S. W. (2d) 932; *Chuck* v. *Abe,* 328 Mo. 81, 40 S. W. (2d) 558.) This is just as true in a res ipsa case as in a specific negligence case. Res ipsa loquitur is a part of the law of evidence. (*Cudney* v. *Midcontinent Airlines,* Mo. Sup., 254 S. W. (2d) 662.) We follow the res ipsa rule stated by the Supreme Court of the United States in *Sweeney* v. *Erving,* 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, as follows: "Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict." (See *McCloskey* v. *Koplar,* 329 Mo. 527, 46 S. W. (2d) 557; *Harke* v. *Haase,* 335 Mo. 1104, 75 S. W. (2d) 1001; *Charlton* v. *Lovelace,* 351 Mo. 364, 173 S. W. (2d) 13; *Cruce* v. *Gulf, M. & O. R. Co.,* 358 Mo. 589, 216 S. W. (2d) 78; *Jesionowski* v. *Boston & M. R. Co.,* 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416.) Certainly plaintiff's evidence was sufficient to make a jury case, under res ipsa, as substantial circumstantial evidence of negligence. Nevertheless, although the jury would have been warranted in inferring negligence from it, such an inference was not compelled and they could also infer from all the evidence that defendant was not negligent. As also said in *Sweeney* v. *Erving, supra*: "When all the evidence is in, the question for the jury is whether the preponderance is with the

plaintiff." The jury was not required to believe plaintiff's uncorroborated testimony about overturning of the chair and the coal bucket and could have found that plaintiff was off balance when the train started. (It may have been significant to the jury that after subpoenaing Meek, and having him present at the trial, plaintiff did not call him as a witness.) In short, the jury is no more compelled to believe a plaintiff's statement as to what happened than it is a defendant's explanation. (See *Gannon* v. *Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.) Of course, it must be and is conceded that plaintiff was injured but the question of whether or not there was negligence on the part of defendant, causing his injury, was an issue to be determined by the jury.

As to the weight of the evidence, our rule is that where the trial court has denied a new trial on such a discretionary ground, as here, an appellate court will not interfere unless it clearly appears that the trial court has abused or arbitrarily exercised its discretion. (*King* v. *Kansas City Life Ins. Co.*, 350 Mo. 75, 164 S. W. (2d) 458.) As said in that case: "The reason is that the trial court has a better opportunity to sense the trial atmosphere, confront the witnesses and consider unrecordable evidences of what the truth more probably is—things which appellate courts usually cannot glean from the cold record." Therefore, our rule is to defer to the ruling of the trial court, on such a discretionary ground, whether it grants or refuses to grant a new trial. We cannot find abuse of discretion or arbitrary action in a case where the question of negligence was a jury question, even though we should feel that as triers of the facts we might have decided it differently, when there is nothing to show passion, prejudice or misconduct. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572, cited by plaintiff, is a case in which there was a plaintiff's verdict which was reversed by a

state appellate court on the ground that the evidence was insufficient to show negligence. Of course, in that situation, as held by the United States Supreme Court, the verdict of the jury must stand if there was a reasonable basis in the evidence for their verdict. Plaintiff apparently confuses that situation of improperly setting aside a verdict for a plaintiff (when there was substantial evidence to support the plaintiff's verdict) with the situation here in which the jury found against plaintiff. In the *Ellis* case the Court held that the jury might properly have found either way on the issue of defendant's negligence and that "it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable." It would be close to the same thing for us to grant a new trial on the ground that it would have been more reasonable for the jury to reach a different conclusion as to negligence in this case, after the trial judge has found that the verdict was not against the weight of the evidence. *Zumwalt* v. *Gardner,* (USCA 8th), 160 Fed. (2d) 298, cited by plaintiff, was reversed for error in instructions. Likewise, the other cases cited by plaintiff are not controlling on this assignment and it is overruled.

Plaintiff alleges error in admission of a United States Veteran's Administration Hospital Record concerning plaintiff's stay at its Wichita Hospital in June and July 1945 for 30 days. Plaintiff's counsel had said in his opening statement that plaintiff went to the Veteran's Hospital at this time because he was tired out from overwork during he war years. Plaintiff testified that he did go because he was "just wore out" but denied having a nervous condition. The clinical record admitted showed that plaintiff complained of being "a little nervous and tired out or run down" and had a sensation "like some little bugs or something crawling on the skin at times"; and

contained the diagnosis "psychoneurosis anxiety type mild." After defendant's counsel read in evidence this part of the clinical record, plaintiff's counsel read other parts showing nurses daily reports and physical examination results, more favorable to him. Plaintiff objected that the record was incompetent, confidential and privileged; contained conclusions and violated the hearsay rule; that it was brought in by a person not qualified to testify about its contents and without showing it was properly made; and now says, in offering it, defendant did not comply with the "Business Records Act." (Sec's. 490.660-490.690 RSMo. V.A.M.S., citing *Gray* v. *St. Louis—S.F.R.Co.*, Mo. Sup., 254 S. W. (2d) 577; and *New York Life Ins. Co.* v. *Taylor*, D.C.C.A., 147 Fed. (2d) 297.) The witness who produced the record was a Veteran's Administration examiner and attorney in the St. Louis Regional Office. The Court asked plaintiff's counsel if there was "any doubt that this is not an official document of our government" and he answered: "I don't think there is any doubt about it but * * * I don't know that it is." However, whether or not there was an admission of authenticity by plaintiff, we think this witness's testimony was sufficient to show that it was an official record, required by law to be kept, and obtained from the Wichita Regional Office.

Nevertheless, the witness was not in the hospital department, had nothing to do with keeping the record and had no personal knowledge about that. In the *Gray* case (254 S. W. (2d), l.c. 579) we held that Sec. 490.680 applies to and affects the admissibility of hospital records in the courts of this state, and we were considering the admissibility of a Veteran's Administration hospital record in that case. Although we can consider that the identity of this record was established, there was no showing as to the mode of its preparation or as to when it was made. According to Wigmore (3rd Ed., Sec. 1707), the admis-

sion of hospital records has always depended upon statute and that is true in this state as shown in the *Gray* case. Defendant's theory is that "records of the United States Government required by law to be kept are admissible in Missouri Courts under an exception to the hearsay rule", citing *Priddy* v. *Boice,* 201 Mo. 309, 99 S. W. 1055. However, the record in that case was a certified copy of United States census reports; and it was admitted to show facts which public officers were required by law to determine. The opinion also puts records of weather conditions on this same basis. Other cases cited by defendant rule admissibility of reports of physical examinations made by Veteran's Administration doctors in actions in federal courts on war insurance policies (*United States* v. *Cole,* C.C.A. 6th, 45 Fed. (2d) 339; *Third National Bank & Trust Co.* v. *United States,* C.C.A. 6th, 53 Fed. (2d) 599) and to review a Railroad Retirement Board order (*Taylor* v. *Latimer,* 47 Fed. Supp. 236), and are not controlling here. (As to the kind of official records admissible under the "public documents" exception see 5 Wigmore, 3rd Ed. 512, Chap. LVI.) We must reaffirm our previous rulings that Sec. 490.680 controls the admission of hospital records and hold that defendant failed to make the showing required for admission of this hospital record, although, of course, plaintiff cannot be heard to object to the part of the record he read to the jury.

However, we cannot hold there was prejudicial error requiring a reversal because the jury found for defendant on the issue of liability and this evidence related only to the extent of plaintiff's injuries and amount of damages. (*Miller* v. *Riss & Co.,* Mo. Sup., 259 S. W. (2d) 366; *Poague* v. *Kurn,* 346 Mo. 153, 140 S. W. (2d) 13 and cases cited.) Plaintiff's objection as to the record being confidential and privileged, of course, was not valid since he was contending the injury to his head had caused damage to his

brain resulting in a form of insanity which would become progressively worse and finally require him to be confined in a state institution. Plaintiff contends that this record showing a diagnosis of psychoneurosis injected a false issue into the case, first, as to considering whether plaintiff's mental condition was a continuation of a condition existing in 1945, and second, whether this condition made his testimony unreliable. As to the first, this was not a false issue but a very material one because in fixing damages the jury had to decide (if they found liability) whether plaintiff's claimed mental condition resulted wholly from his injury or existed in whole or in part prior thereto. As to the second, the medical evidence offered by plaintiff showed a far worse mental condition than indicated by the hospital record, including delusions and false beliefs; and plaintiff's counsel stated to the jury that plaintiff had symptoms of insanity and that his mind was "irretrievably gone." If his credibility was affected by evidence of an abnormal mental condition, this was done as a part of plaintiff's case. Plaintiff also says the court refused to allow him to testify about the prior performance of the caboose; but plaintiff has not briefed this as an allegation of error, made no offer of proof at the trial and did not specifically mention it in his motion for new trial, so that there is nothing preserved for review.

Plaintiff also alleges error in instructions 5 and 6, given at defendant's request. As to instruction 5, plaintiff objects to the last sentence which was: "You should not find that defendant was negligent from the *mere fact of the occurrence* shown by plaintiff's evidence, if you find and believe from all of the evidence in the case that defendant was not negligent; and if you do find and believe from all the evidence in the case that defendant was not negligent, then your verdict should be for the defendant." Plaintiff says only that this italicised phrase was unneces-

sary and confusing in a res ipsa case. This sentence was suggested in *Harke* v. *Haase,* 335 Mo. 1104, 75 S. W. (2d) 1001; and approved by the Court en Banc in *Lukitsch* v. *St. Louis Public Service Co.,* 362 Mo. 1071, 246 S. W. (2d) 749. It might be better to use the word "sole" in place of the word "mere". However, Webster's New International Dictionary, 2d Ed. gives as definitions of "mere": "only this, and nothing else" and "nothing more than". We think it is clear that this instruction uses this term in this sense; and that considering the submission as a whole it was made plain to the jury that the occurrence could be "sufficient circumstantial evidence to warrant a finding by you that the defendant was negligent," as stated in instruction 1. It was also necessary and proper to tell them that they should make their finding as to negligence "from all the evidence in the case" and that is what this instruction did.

Instruction 6 was as follows: "You are instructed that the burden of proof is on the plaintiff to show by the greater weight of the credible evidence that the way car in which the plaintiff was riding was caused to be suddenly, unexpectedly and violently jerked with such unusual and extraordinary force and violence that the plaintiff was caused to strike the stanchion in the way car. And the Court instructs you that if you find from all the evidence that when the train started up to proceed into the South Shawnee yard, the way car jerked and the plaintiff was caused to strike the stanchion *but the force of the jerk was not unusual and extraordinary in the operation of freight trains,* you shall find for the defendant."

Plaintiff says the italicised portion of this instruction singled out a particular matter and only required the jury to find on negligence from that, citing *Colwell* v. *St. Louis —S.F.R.Co.,* 335 Mo. 494, 73 S. W. (2d) 222; and *Lithegner* v. *City of St. Louis,* Mo. App., 125 S. W. (2d) 925. Plain-

tiff also says it leaves for consideration of the jury only the testimony of defense witnesses as to what happened at the head end of the train. Plaintiff further says: "It likewise invites the jury to accept defendant's false theory of the case that plaintiff's condition of ill-being at the trial, was a continuation of a 1945 attack of psychoneurosis as revealed by the incompetent and inadmissible Veteran's Hospital Record and thus excludes the evidence of what happened in the caboose by destroying the credibility of Conser's testimony." We are unable to follow this argument and cannot see anything in this instruction in any way related to psychoneurosis or excluding consideration of plaintiff's testimony. We think this was a proper converse instruction, in view of instruction 1 given at plaintiff's request. The first sentence was substantially in the same language as used in instruction 1, stating the facts essential to recovery. Instruction 1 properly required a finding that the "jerk of said caboose was unusual and extraordinary." Instruction 6 required a finding that it was not (in the kind of operation being conducted) as the condition for finding it for defendant. This submitted the converse of an essential element of plaintiff's case and a defendant is entitled to a verdict if the plaintiff fails to prove any essential element of his case. Therefore, he is entitled to submit the converse of any essential element thereof. (See *Janssens* v. *Thompson*, 360 Mo. 351, 228 S. W. (2d) 743; see also *Quigley* v. *St. Louis Public Service Co.*, Mo. Sup., 201 S. W. (2d) 169.) There was nothing wrong in limiting this to freight trains because it was the operation of a freight train that was involved in this case. Considering the instruction as a whole, as we must always do, we think the issues were made plain to the jury. We hold there was no error in giving these instructions.

The judgment is affirned.

LAURANCE M. HYDE, *Presiding Judge.*

All concur.

JUDGMENT OF THE COURT BELOW
(R. 442, 443)

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

DEFENDANT'S EXHIBITS 7 AND 8 AS READ BEFORE COURT AND JURY
(R. 258-267)

Mr. Coburn: If your Honor please, I would like to read a few things from, first, defendant's exhibit number 8.

"APPLICATION FOR HOSPITAL TREATMENT."

Now reading, if your Honor please, from Defendant's exhibit number 8.

"APPLICATION FOR HOSPITAL TREATMENT OR DOMICILIARY CARE"

Eugene—I mean, yes, Eugene H. Conser "hereby" applies "for admission to a Veterans" hospital "facility for hospital treatment." "914 south" 3rd street, "Arkansas City, Kansas." "Subscribed and sworn to before me this 16th day of June, 1945, by Eugene H. Conser", and then a notary public attested to this application.

On page 3 of the application it reads as follows, Reading now from page 3 of the application.

"MEDICAL CERTIFICATE

A careful physical (including mental) examination of the applicant discloses these findings and diagnosis:

(1) "the "Brief History:

General mailaise—depressed, lowered vitality and loss of appetite and weight. Tired and sleepy all the time. Easily flustrated and irritated.

(2) Symptoms:

Loss of appetite—nervous—constant feeling of impending danger. Drowsiness bad color.

(3) Physical findings:

Constipation and tremor, wakefullness very forgetful, no appetite—yellowish sallow color ambition gone.

(4) Diagnosis:

Guarded as to complete recovery, neurologically." Then there's the name Eugene H. Conser at the bottom, which I do not know whether it's his signature or not.

Mr. Monek: Well, I think—

Mr. Coburn: It may be the signature of the doctor, it may be a different—

Mr. Monek: Well, I think you can agree that is in a different handwriting entirely than what he made out;—these medical reports?

Mr. Coburn: Yes.

Mr. Monek: You will agree to that, won't you.

Mr. Coburn: Yes; that's right.

Mr. Monek: All right.

Mr. Coburn: We will agree, then, that the medical certificate is signed by the doctor, rather than by Mr. Conser. All right; I am reading from the Clearance Sheet, also a part of defendant's exhibit number 8.

"The undersigned claimant is being discharged.
7-17-45."

And signed "H. C. Curtis (Ward Surgeon)". I think that's all of that. Now, if your Honor please, I would like to read from parts of defendant's exhibit number 7, as follows.

"CLINICAL RECORD"

Eugene H. Conser.

"Facility Wichita, Kansas

Permanent address of patient" "914 S. 3rd" Street

Arkansas City, Kansas"

"Wife: Nannie M. Conser" of the "same address".

"DIAGNOSIS Psychoneurosis Anxiety type mild"

"Date of Diagnosis 7-14-45"

And marked here "Result of treatment" "Improved".

On the back side of the first page

"Dispostition Discharged".

"Date of disposition 7-17-45".

"Remarks: Maximum benefit Improved".

Signed "H C Curtis Ward Surgeon."

And farther down on that page, "Neurological—type undetermined.

Ordered to report by CMO. Able to pay return transportation to Arkansas City, Kans.

Has resided in Arkansas City, Kansas since 1919.

Never hospitalized at a VA."

And then, reading from the third page of defendant's exhibit 7, as follows:

"CLINICAL RECORD
HISTORY OF PRESENT DISEASE

PRESENT ILLNESS:

Probable cause, date, and mode of onset of disease. Date and Cause of injury. Evolution and course to admission:

Then typed in:

"Feels like there is a bug on him, it never seems to be in any particular place but changes the location. Prespires freely. Says that he has pain in his back and legs. Also can't sit still very long because it makes him nervous. Has been this way for about a year. Appetite not good, but sleeps well. Feels tired out all the time. Last worked on Saturday".

Mr. Monek: Is there any indication of the day that this was made out?

Mr. Coburn: Where it says last worked on Saturday?

Mr. Monek: Yes; what's the date of that? I see; all right.

Mr. Coburn: (Reading)

"ON ADMISSION:

Chief complaint and other subjective complaints:" is in printing, and then typed down there,

"Neurological-type undetermined."

And then, turning over to page 5 of the same record. Reading from page 5, now, defendant's exhibit 7, in the handwriting of the doctor which is signed by the name H. C. Curtis:

"A white male age 47—married one child" Patient "says he is" a "conductor on" the railroad "a veteran of" world war 1.

"Syphilis denied" and doesn't ("don't") "use whiskey.

Been working for "railroads "since 1920

Had hemorrhoids 15 yrs ago

No other operations."

or

"*Complaints.* Just feel tire—no pep. I have a sensation at times of some crawling on" the "skin or body." It "feels like some little bugs or something crawling on the skin at times." He feels good (should be "sleeps good"—) appetite fair don't get hungry." *Examination.* "Well nourished well developed gait normal, station normal"

I guess it is,

"pupils equal" general normal or something,—

Mr. Monek: G. U. normal.

Mr. Coburn: "Gu normal"; that's right. "Patellar increased no clonus.

Neurological normal.

"***Mental.***

Man complains at times of formication, or sensation of some crawling on skin. Says that is not of much

consequence now. He is well oriented, for time, person and place. He has a few vague complaints but nothing very definite. Just wanted a check up or examination. Says he feels a little tired and just got a little nervous had no appetite though he would come to the hospital to see what was wrong. Says has no aches or pains no discomforts just feels a little nervous and tired out or run down. The laboratory work shows no pathology and nothing of any organic nature is found."

Diagnosis "Psychoneurosis anxiety type mild

H C Curtis"

That's all.

Mr. Monek: There are sections I would like to read of this, your Honor. Now the

"CLINICAL RECORD
"WARD PHYSICIAN'S PROGRESS AND TREATMENT RECORD"

by "H. C. Curtis." "Daily Notes" for "6-26-45." We will go down to 6-"28". "Complains of being weak and tired". Signed "Curtis". And the 29th, "tired and" doesn't ("Don't") "feel well". Signed "Curtis". And July the 5th ("6") "tired". And then the rest is "No complaints", "no complaints" and "Discharged". Now, in the

"CLINICAL RECORD
NURSE'S PROGRESS AND TREATMENT RECORD"

is "6/26/45" at the "Hour" of "2:00" and "Treatment Shower bath". Then it says "Daily Notes" "Reg" "Admitted to Ward 1, Ambulant. Doesn't appear" mentally "ill" some pain in back. Clothing checked" No complaints quiet night". (The exhibit actually reads "Daily Notes"

as a column head. Under the column "Diet" appears "Reg". Under the column "Daily Notes" appears "Admitted to Ward 1, Ambulant. Doesn't appear acutely ill" "Some pain in back. Clothing checked" and opposite the date "6-27-45" "No complaints quiet night".)

Mr. Coburn: These are the nurse's notes, now, aren't they?

Mr. Monek: "No complaints".

Mr. Coburn: Are they not?

Mr. Monek: Well, "Nurse's Progress and Treatment". The next day, "6-28-45" "Slept well". "Up and about appears fairly comfortable". Following, "6-28", the same day, "No complaints". "6-29" Quiet night" "Ambulant. Apparently feeling well except for a tired feeling. Self care." "No complaints. Slept Well." ("No complaints Slept well" is opposite the date "6-30.45") Then "6-30" "Normal day. No change. Appears comfortable No complaints. A quiet night.", "7-1.45" Ambulant as desired no complaints this a. m.. Is cheerful and cooperative". "7-2-45" Slept well" "no change noted" "Quiet night". (Quiet night is opposite "7-3-45".) "7-3-45 No complaints". "7-4-45 Quiet night" "Ambulant care. Offered no complaints." 7-5-45 Slept well" no change noted Quiet night" "7-6-45 Ambulant as desired. Cheerful and cooperative" "Slept well". "7-7-45 No change" "Slept well". "7-8-45 As well as usual." "7-9" "A good night" "Ambulant ad lib comfortable. Is agreeable and cooperative" "A good night" "Ambulant as desired No complaints this a m". That's "7-11-45. "7-12" "A good night" "ambulant self care. Is agreeable and cooperative assists with light ward work. No complaints to nurse". "7-13" "No change this a m." "7-14-45 A good night" "usual day". "7-15" "No apparent change in condition"

"A good night". ("A good night" appears opposite "7-16-45".) "7-16" Usual day". "7-17-45" "A good night." "Discharged". Also under

"General Physical Examination"

on "6-27-45"

the date of admission,

"Temperature 98.6 Respiration 18 Pulse at rest 74 Blood pressure 100/66

General appearance: good

Eyes, Ears, Nose, throat, sinuses: Normal

Cardiovascular system: Normal

Respiratory system: Normal

Digestive system: Normal

Spleen, lymph nodes & thyroid: Normal

Nervous system: special

Genitourinary system: Normal"

"No arthritis, hernia, hyrocele, varicocele or varicose veins."

"Skin: clear"

"Diagnosis:"—there is a blank, eh?

Mr. Coburn: That's blank; yes.

Mr. Monek: And it's signed "G. K. Purves Ward Surgeon". That's all.

Mr. Coburn: All right; thank you. No further questions.

Mr. Monek: No questions.

(R. 108, 109)

EXCERPTS FROM PETITIONER'S TESTIMONY ON DEFENDANT'S EXHIBITS 7 AND 8 AS READ INTO THE RECORD

Q. Now, Mr. Conser, were you in the hospital before this accident ever happened? A. Yes, sir.

Q. When was that? A. 1945.

Q. When in 1945? A. Oh, it was in July of 1945.

Q. And were you there for the treatment of a bone injury, or nervous condition, or what? A. Just wore out.

Q. Well, would you say you were there for the treatment of a nervous condition, or not? A. No.

Q. You wouldn't. Isn't it a fact that you were there for the treatment of a nervous condition before this accident ever happened? A. Not that I know of.

Q. What hospital was that, Mr. Conser? A. The Veterans' hospital in Wichita, Kansas.

Q. You were there for how long? A. I was there for 30 days.

Q. Before you went into that hospital didn't you have a depressed feeling about conditions in general? A. When a man is overworked he gets lots of feelings.

Mr. Coburn: I move that the answer be stricken as not responsive.

The Court: It may be stricken.

Q. Now, Mr. Conser, just listen to my questions and we will get along fine. When you entered the hospital there in 1945 you were suffering from a depressed feeling, weren't you? A. Tired out.

Q. Well, but did you—you know what I mean, don't you? Were you having a depressed sort of feeling so that you felt that everything was hopeless; that you couldn't cope with your own problems? A. No.

Q. You didn't have that feeling? A. No.

Q. You didn't have a feeling that the future was hopeless for you? A. No, sir.

Q. Not at all? A. No, sir.

Q. Did you have any feeling of anxiety about matters at that time? A. No, sir.

Q. Did not. You weren't tense, in any sense of the word? A. No, sir.

Q. Did you have a sensation at that time that a bug was crawling over you? A. No, sir.

Q. You did not. In July of 1945? A. No, sir.

JUL 26 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1954.

EUGENE H. CONSER,
Petitioner,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Respondent.

No. 195

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1954.

EUGENE H. CONSER,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Respondent.

No. .....

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

No Federal Question of Substance Was Decided by the Supreme Court of Missouri in Affirming the Judgment for the Defendant in the Trial Court.

The petitioner contends that within the meaning of the Federal Statute governing the issuance of a writ of certiorari by the Supreme Court of the United States to a court of last resort of a state [28 U. S. C. A. 1257 (3)], a title, right, privilege or immunity of the petitioner under the Federal Employers' Liability Statute was determined adversely to the petitioner by the decision of the Supreme

Court of Missouri. The question of whether certiorari should be issued in this case is also governed by Rule 19 of the Revised Rules of the Supreme Court of the United States (effective July 1, 1954), which states that a review on writ of certiorari is not a matter of right and that the following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

It is the position of the respondent that no Federal question of substance was decided by the Supreme Court of Missouri.

The petitioner's contention that this Court should issue a writ of certiorari is based upon the determination by the Supreme Court of Missouri that although error was committed in the trial court in the reception in evidence of the Veterans Hospital Record (Defendant's Exhibits 7 and 8, Appendix to Petition for Certiorari, pp. 31-38), this error was not prejudicial. In that connection the Missouri court held that the evidence improperly admitted related only to the question of damages, and the jury did not consider that question since it found in favor of the defendant on liability.

It is fundamental that the decision of a state court based on procedural grounds, rather than matters of substance, is not subject to review by the Supreme Court of the United States. **State of Missouri ex rel. Southern Ry. Co. v. Mayfield,** 340 U. S. 1, 71 S. Ct. 1.

The ruling of a state court as to the admissibility of evidence presents no Federal question. **Central Vermont Ry. Co. v. White,** 238 U. S. 507, 35 S. Ct. 865; **Los Angeles**

Farming & Milling Co. v. City of Los Angeles, 217 U. S. 217, 30 S. Ct. 452; **West v. Louisiana,** 194 U. S. 258, 24 S. Ct. 650.

Furthermore, it has been held that the decision of a state court on appeal that error committed in the trial of a case is not prejudicial error, presents no Federal question. **Central Vermont Ry. Co. v. White,** 238 U. S. 507, 35 S. Ct. 865; **Barrington v. Missouri,** 205 U. S. 458, 27 S. Ct. 582.

Central Vermont Ry. Co. v. White, supra, was an action for the death of a railroad employee under the Federal Employers' Liability Act brought in the state court of Vermont. The plaintiff prevailed in the trial court and the judgment was affirmed by the Supreme Court of Vermont. On appeal it was contended by the defendant that the original declaration failed to allege that the decedent was engaged in interstate commerce at the time of the accident and that the defendant's motion in arrest of judgment should have been sustained below. It was held, however, that the subsequent filing of a replication by the plaintiff in which it was alleged that the decedent was engaged in interstate commerce at the time of his death cured the defect in the original petition. On writ of error it was held by the Supreme Court of the United States that the decision of the Supreme Court of Vermont that the erroneous omission in the petition was not prejudicial error presented no Federal question.

Barrington v. Missouri, supra, came before the Supreme Court of the United States to review a decision of the Supreme Court of Missouri affirming a conviction for murder in a Missouri trial court. Among other things, it was contended that the Supreme Court of Missouri had improperly held that the failure of the prosecution to endorse the names of all of the witnesses on the indictment before trial, as required by the statutes of Missouri, was

not prejudicial error because the record showed that the appellant had received ample notice of the additional witnesses from other sources. The Supreme Court of the United States held that the decision of the Supreme Court of Missouri that the error was not prejudicial presented no Federal question, and the writ of error was dismissed.

It has been said that no Federal question is presented which will justify the intervention of the Supreme Court of the United States in a Federal Employers' Liability Act case unless the record discloses that there was necessarily present in the trial of the case a definite issue requiring a construction of the Federal Employers' Liability Act. **Central Vermont Ry. Co. v. White**, 238 U. S. 507, 35 S. Ct. 865; **Seaboard Air Line R. R. Co. v. Duvall**, 255 U. S. 477, 32 S. Ct. 790.

In **Central Vermont Ry. Co. v. White**, supra, this Court said (35 S. Ct., l. c. 866):

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial court which involve no construction of the Employers' Liability Act, and which, therefore, cannot be considered on writ of error from a state court."

The determination by the Supreme Court of Missouri that the admission of the Veterans Hospital Record (Defendant's Exhibits 7 and 8, Appendix to Petition for Certiorari pp. 31-38) was non-prejudicial error under the decisions of the State of Missouri did not involve any construction of the Federal Employers' Liability Act under which the action at bar was brought. On the authority of **Central Vermont Ry. Co. v. White**, supra, no Federal question is, therefore, presented.

The petitioner contends that upon the authority of **Bailey v. Central Vermont Ry. Co.**, 319 U. S. 350, 63 S. Ct. 1062, a Federal question of substance is present. But the **Bailey** case is altogether unlike the case at hand. There a judgment for the plaintiff had been reversed by the Supreme Court of Vermont for the reason that the defendant's motion for a directed verdict should have been sustained below. This decision necessarily involved a construction of the plaintiff's substantive rights under the Federal Employers' Liability Act.

But in the case at bar the petitioner was accorded a jury trial, and the jury found against the petitioner. The Supreme Court of Missouri held merely that in one instance the method of conducting the jury trial was erroneous, but that under local law the error did not influence the verdict sufficiently to justify a new trial. This decision did not involve a construction of the Federal Employers' Liability Act in any sense. On the contrary, it involved a question of state court procedure governed entirely by local law.

Petitioner says that the introduction of the Veterans Hospital Record could well have led the jury to believe the plaintiff's entire story of what happened in the caboose was unreliable (presumably because plaintiff had once been treated as a psychoneurotic). But as the Supreme Court of Missouri said, how much more would the jury have been influenced to disbelieve the plaintiff by his medical testimony that the plaintiff had suffered a severe injury to his brain, which had caused violent mental aberrations before the plaintiff testified at the trial.

Petitioner relies on **Deery v. Cray**, 5 Wall. 795, 72 U. S. 795, and **Mexia v. Oliver**, 148 U. S. 664, 13 S. Ct. 754, as holding that no judgment should be reversed when the error worked no injury only if it is clear beyond doubt

that the error did not prejudice the parties' rights. But this case was tried in the State Court of Missouri after petitioner had elected to bring this action in that court. It is, therefore, governed not by those decisions, but by Section 512.160 (2), Vernon's Annotated Missouri Statutes, 1949, which provides:

> "No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action."

Petitioner also apparently contends, on the authority of **Galloway v. United States**, 319 U. S. 372, 63 S. Ct. 1077, that this earlier Hospital Record of his treatment for psychoneurosis in 1945, five years before the accident, could not justify the inference that the plaintiff's condition continued to the time of injury. **Galloway** was an action on a war risk insurance policy. To recover it was necessary that the plaintiff prove continuous disability from 1919 to the time of suit in 1938. On the contrary, the defendant in the case at bar did not contend that Conser was mentally ill continuously from 1945 to the accident in 1950. But in a case where the plaintiff was claiming that as a result of head injuries he had become grossly disturbed emotionally, it was certainly material (if not competent) to show that the plaintiff had had treatment for emotional instability before the accident in question. This tended to minimize the plaintiff's damages. In any event, the petitioner did not contend in the trial court that the Hospital Record was immaterial. (See opinion of Missouri Supreme Court, Appendix p. 26.)

The decision of the Missouri Supreme Court did not involve, nor even touch, a construction of the Federal Employers' Liability Act. On the contrary, it involved an application of a Missouri Statute, Section 512.160 (2),

Vernon's Annotated Missouri Statutes, 1949, as interpreted by the courts of Missouri, in such cases as **Miller v. Riss & Co.**, 259 S. W. (2d) 366 (Mo. Sup.), and **Poague v. Kurn**, 346 Mo. 153, 140 S. W. (2d) 13.

II.

The Decision of the Supreme Court of Missouri Did Not Constitute a Determination of a Question in a Way Probably Not in Accord With Applicable Decisions of the Supreme Court of the United States.

The Supreme Court of Missouri held that there was no prejudicial error in the erroneous reception of evidence pertaining to the plaintiff's damages because the jury found for the defendant on the issue of liability. In so holding the Supreme Court of Missouri followed a well-recognized line of local cases headed by **Miller v. Riss & Co.**, 259 S. W. (2d) 366 (Mo. Sup.), and **Poague v. Kurn**, 346 Mo. 153, 140 S. W. (2d) 13.

The petitioner complains that the jury was not cautioned that the Hospital Record was to be considered only on the issue of petitioner's injuries, and not on the question of liability. (See Petition for Certiorari p. 11.) No need for such a cautionary instruction was apparent at that stage of the litigation. And it is probable that instructions as to what evidence should be considered in determining what issues would only have made the instructions prolix and confusing. In any event, if the petitioner was apprehensive as to the use to which the jury might put the Hospital Record, it was the petitioner's duty to offer a clarifying or cautionary instruction, and not having done so, the petitioner cannot complain after an adverse verdict. **Keyes v. Chicago, B. & Q. R. Co.**, 326 Mo. 236, 31 S. W. (2d) 50, l. c. 64.

The decision of the Missouri Supreme Court is in accord with applicable decisions of this Court to the effect that any error committed in the trial of a case with reference to the issue of damages is considered non-prejudicial where the question of liability was resolved in favor of the defendant. Such decisions are:

Blanton v. Atlantic & Pacific Tea Co., 61 Fed. (2d) 427 (5 C. C. A.), cert. den. 288 U. S. 609, 53 S. Ct. 405;

George P. Clark Co. v. Kuebler Foundries, 285 Fed. 568, cert. den. 261 U. S. 622, 43 S. Ct. 434.

Therefore, pursuant to Rule 19 (1) (a) of this Court, even if the decision of the Supreme Court of Missouri should be considered to be the determination of a Federal question of substance, certiorari should not issue. This, because the Missouri decision did not constitute a determination of a question in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

CONCLUSION.

It is respectfully submitted that the petition for the issuance of a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1954

EUGENE H. CONSER, Petitioner, vs. **THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,** Respondent.	No. 195

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

There Is No Independent Non-Federal Question In This Case

We come here with error established in the admission of the hospital record in evidence at the trial by the ruling on that question of the Missouri Supreme Court. That ruling is in accordance with federal law on that question. *New York Life Ins. Co.* v. *Taylor*, 147 F (2d) 297. The sole question here is whether that error was or could have been prejudicial.

Respondent's theory in opposing the petition in this case for a writ of certiorari to the Supreme Court of Missouri, is stated in its brief, at page 5. It is there said:

> But in the case at bar the petitioner was accorded a jury trial and the jury found against the petitioner.

> The Supreme Court of Missouri held merely that in one instance the method of conducting the jury trial was erroneous, but that under local law the error did not influence the verdict sufficiently to justify a new trial. The decision did not involve a construction of the Federal Employers' Liability Act in any sense. On the contrary, it involved a question of state court procedure governed entirely by local law.

Petitioner, in electing to pursue his remedy provided in the Federal Employers' Liability Act, filed his suit in a Missouri State Court having jurisdiction in such cases and which was specifically granted in such cases, concurrent with Federal District Courts in Section 6 (45 U.S.C.A., Section 56) of the Act itself. The Missouri judicial system makes provision for trial by jury.

The rule in Federal Courts, as well as in State Courts, is that verdicts of juries must be just and based upon fair, impartial and unprejudiced consideration by the jury. This rule is applicable regardless of the source from which prejudicial matter gets into the record, whether from adverse evidence improperly admitted, improper instructions, or from the conduct of opposing counsel. That rule was applied by the Eighth Circuit, United States Court of Appeals in two recent cases—*Missouri-K-T-R. Co. of Texas* v. *Ridgeway,* 191 F (2d) 363, at 370 and *Kroger Grocery & Baking Co.* v. *Stewart,* 164 F (2d) 841 at 845. The rule as stated is:

> This court, in the interest of an orderly administration of justice, will continue to do all that reasonably may be done to assure litigants that a trial in a District Court of the United States shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law.

The right to such consideration in a case brought under the Federal Employers' Liability Act is a substantial inci-

dent to the right of recovery in such cases granted by this federal law and to be determined by federal rather than local law. See, *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U. S. 359, 361; 72 S.Ct. 312, 314.

There is no question of admissibility of evidence in this case, here. The Supreme Court of Missouri held that it was error to admit the Veterans Hospital Record in evidence at the trial. The question then became in that Court and the question presented here is, whether that error was or could have been prejudicial to petitioner's case. The Missouri Court held as indicated in the above quoted assertion in respondent's brief, that the question is and was decided as one of local law.

Since the right to an unprejudiced hearing was an incident of the right of recovery under the Act, federal law and not the local law of the State, controls, in determining the question of what the effect was or could have been. There is no independent, non-federal question involved. The State Court was without power, under local law, to decide a question, arising even from "merely one instance" in the method of conducting the jury trial, when that instance was error that was or could have been prejudicial of petitioner's federal rights. By no technical or local procedural device can a State defeat the effective enjoyment of a federal right. *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 21, 44 S.Ct. 11, 13; *Davis* v. *Wechsler,* 263 U.S. 22, 24, 44 S.Ct. 13, 14. And see Mr. Justice Frankfurter's dissent in *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379 at 394, 73 S.Ct. 749 at 757 and *Brown* v. *Western Railway of Alabama,* 338 U.S. 294, 70 S.Ct. 105, 106.

The Missouri Court was required to proceed in such manner that all of the substantial federal rights of the petitioner in this suit brought in the courts of the State would be protected. Whether it has done so, is, in itself,

a federal question reviewable here under 28 U.S.C., Sec. 1257 (3). *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 245, 63 S.Ct. 246, 251.

We deem these matters to be so clearly established that it becomes unnecessary for us to discuss the authorities cited by respondent in its brief. We have no quarrel with what the cited cases really hold. For example in its brief (page 2) respondent says:

> It is fundamental that the decision of a State Court based on procedural grounds rather than matters of substance, is not subject to review by the Supreme Court of the United States. *State of Missouri ex rel. Southern Ry. Co.* v. *Mayfield*, 340 U.S. 1, 71 S.Ct. 1.

The *Mayfield—Murphy* cases do not so hold. What these cases, consolidated for convenience in deciding the identical questions presented, do, is to apply the principle of our dual system of government under our Constitution. These cases merely recognize the respective positions of the governments of the United States and of the several states in the national system of jurisprudence and, correctly, leave the State Courts their rights to have and to exercise their own sovereign powers, reserved to them or to the people in the Constitution, after the grant of certain enumerated powers to the federal government. When a State Court decides a non-federal question in a manner not in conflict with constitutional guarantees, then the review of such questions are not within the jurisdiction of this Court. That is all that the cases cited by respondent hold.

The question here is not of that nature. The Missouri Court was dealing with a federally created right. In deciding it, the Missouri Court necessarily construed the federal law that created the rights asserted by petitioner. Whether it protected those rights is the federal question.

II.

The Decision of the Supreme Court of Missouri Is In Conflict With the Principle Announced By This Court in Deery vs. Cray, **5 Wall. 795, and Other Cases.**

It is said (Respondent's Brief 7) that, in holding the error here involved not to be prejudicial, the Missouri Court followed a well recognized line of local cases headed by *Miller* v. *Riss & Co.*, 259 S.W. (2d) 366. That is true.

It is also said (page 8) that this holding is in accord with holdings of this Court to the effect that any error committed in the trial of a case with reference to the issue of damages is considered non-prejudicial, where the question of liability was resolved in favor of the defendant.

We have discovered no decision of this Court, or of any federal Court, laying down any such rule—except, perhaps, in certain types of diversity cases where the federal Court was required to apply the law as it found it in the State where it was sitting.

Respondent cites *Blanton* v. *Atlantic & Pacific Tea Co.*, 61 F (2d) 427, cert. den. 288 U.S. 600, and *George P. Clark Co.* v. *Kuebler Foundries*, 285 Fed. 568, cert. den. 261 U.S. 622.

In every case we have been able to find, both federal and state, the rule is as stated in *Deery* v. *Cray* that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling is made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the parties' rights.

This is a far cry from the statement of the rule by respondent at the top of page 8 of its brief.

The sole answer of respondent to the rule of *Deery* v. *Cray*, is Section 512-160 (2), Vernon's Annotated Missouri Statutes, 1949, which provides:

> No Appellate Court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action.

There is no quarrel with this provision of the Missouri statute. Nevertheless it is not controlling here. This Court will determine, under its own decisions whether the Supreme Court of Missouri has decided the question of whether the error here "materially affected the merits" of this action under a federal statute. The mere fact that lawyers may determine that the erroneous evidence related only to damages and therefor could not affect the merits is beside the point. The average person serving on a jury would not discover such a reason, obviously, so legalistic.

Certain technical contentions of respondent, we believe, need no reply. At page 6 of its brief it is said petitioner did not contend in the trial court that the hospital record was not material. Petitioner objected to its admission in evidence for many reasons and on the basis of these objections the Missouri Court has held its admission constitutes error. Proper and probative evidence on the subject might or might not be material.

At page 7 of its brief, respondent intimates that some burden might have rested upon petitioner to request a clarifying instruction limiting the consideration of the jury of the hospital record to the issue of damages. That burden was upon respondent until the hospital record became ad-

missible for the purpose for which it was offered by satisfying all the rules applicable to it in that capacity. Wigmore on Evidence, Vol. I, 3rd Ed., Sec. 13, page 300. That status of the document was never reached.

We respectfully contend that the petition should be allowed.

Respectfully submitted,

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